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Supreme Court of the United States

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL,
Petitioners

v.

SUN OIL CO., ET AL

No. 496

SUN OIL CO., ET AL
Petitioners

v.

G. E. BURFORD, ET AL,

No. 528

O. L. HASTINGS, ET AL,
Petitioners

v.

SELBY OIL AND GAS COMPANY, ET AL

DISCUSSION OF QUESTIONS OF THE COURT SUBMITTED IN ITS ORDER RESTORING CASES TO THE DOCKET FOR REARGUMENT

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FIRM FOUNDATION—AUSTIN

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I. (a)

Is the Court proceeding provided by Texas Law for Judicial Examination of orders of the Texas Railroad Commission a "case or controversy" with-

in the meaning of Article III of the United States Constitution?

Sections 8, 10 and 11[1] of Article 6049c, Vernon's Texas Civil Statutes (Acts 1931, 42nd Texas Leg., 1st C.S., Ch. 26; as amended, Acts 1932, 42nd Texas Leg., 4th C.S., p. 3, Ch. 2; as amended, Acts 1935, 44th Leg., Chs. 28 and 76) set forth the statutory procedure to review orders and regulations of the Texas Railroad Commission.

By section 8 any *interested person* affected by an order and who is *dissatisfied* may file suit to *test its validity*. As originally enacted (Acts 1931, 42nd Leg., 1st C.S., Ch. 26) those dissatisfied could ask the court to annul, correct, or modify the order. As the statute presently reads the complaining party may test or determine the validity of the order.

In order for this proceeding to fall within the special competence of a federal district court it must provide for the adjudication of an actual "case or controversy" within the meaning of those terms employed in Article III of the United States Constitution. *Muskrat* v. *United States*, 219 U. S. 346; *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716; *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249.

What is a "case or controversy" to which the judicial power of the United States extends? We see no reason for not measuring the Texas proceeding by the standards set forth in the oft-cited case of *Aetna*

[1]Quoted in appendix

Life Insurance Company v. *Haworth*, 300 U. S. 227. There the court speaking through Mr. Chief Justice Hughes summarized the pertinent cases announcing the following rules:

> 1. There is no appreciable distinction between the terms "case and controversy."
>
> 2. *The judicial power does not extend to a determination of abstract questions.*
>
> 3. The court will not decide hypothetical questions.
>
> 4. The controversy must touch the legal relations of *parties who have adverse legal interests.*
>
> 5. *The matter must be real and substantial* admitting of specific relief through a decree of conclusive character.

The character of the proceeding under the Texas statute must be determined not alone from the bare language of the statute. We must also examine the opinions of the Texas courts vitalizing that language.

To begin with the proceeding "*is a special statutory action to enforce a right which exists only by statute and not under the Constitution or at common law.*" *Gulf Land Company* v. *Atlantic Refining Company*, 134 Tex. 59, 131 S. W. 2d 73. The statute authorizes a determination of the *validity* of the order involved. Now it is hardly open to argument that if by this the statute authorizes a determination merely of the abstract question of validity vel

non without regard for the manner in which the administrative action impinges upon some superior legal right of the complaining party, it is without the province of a federal district court. Such is the doctrine of the *Muskrat* case. See also the concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288. 347'

But a "dissatisfied," "interested person" seeking a judicial determination of the validity of an order of the Texas Railroad Commission need show no injury under Texas law. *Spear* v. *Humble Oil and Refining Company* (Civ. App.) 139 S. W. 2d 212, writ of error dismissed by Texas Supreme Court. Indeed, according to the latest expression of the Texas courts the dissatisfied plaintiff need not even

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'An excellent statement of the rule is that of Judge Lindley speaking for the 7th Circuit Court of Appeals in Ex-Cell-O Corporation v City of Chicago, 115 Fed. 2d 627:

> "The courts may, at the suit of proper parties, determine whether specific acts are unconstitutional or invalid under the law. They may, under similar circumstances, determine whether actions of administrative officials in interpretation and administration of legislative acts violate the constitutional or legal rights of the suitor. In either instance the power of the court is the same, namely: To determine whether constitutional provision or legislative enactment is transcended either by the legislative act itself or by the administration thereof. This power of judicial determination is delicate in character, one to be exercised with caution and care, for it may result in disapproval of acts of the legislative department or of actions of the executive department, both co-ordinate branches of the government. This care, this caution has been proverbially observed by the courts, lest in their zeal to prevent what they deem unjust, they exceed their judicial authority, assert an unwarranted superiority over their co-ordinate governmental branches and invade fields of policy preserved to the legislative arm or the realm of administrative discretion lodged in the executive branch. Obviously such determination may not be had at the suit of any and all members of the public or in an ex parte proceeding. It can be secured only at the suit of one directly and not remotely interested."

show that an oil well, the validity of the permit for which he is litigating, will actually drain any oil from him. *Railroad Commission* v. *Shell Oil Company* (Tex. Civ. App. 1942) 165 S. W. 2d 503, writ of error refused by Texas Supreme Court December 9, 1942[1].

How different from the definition of a justicable "case or controversy" so far as the federal courts are concerned! In this connection the language of this Court in *Massachusetts* v. *Mellon*, 262 U. S. 447, 488, stands in striking contrast:

> "We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. *The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.*" (Emphasis Supplied.)

[1] Rule 483 of the Rules of Practice and Procedure promulgated by the Texas Supreme Court provides in part:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Su-

In *Old Colony Trust Company* v. *Commissioners*, 279 U. S. 716, 724, this court held that the term "case" as used in Article III of the United States Constitution implies the existence of *adverse parties* whose contentions are submitted to the court for adjudication. See also *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300, where this court declined to pass on the case because there were no *adverse* parties.

Under the special statutory proceeding provided by Article 6049c of the Texas statutes of Texas Railroad Commission has been held the only necessary party defendant in a suit brought by one dissatisfied. The land-owner securing the permit to drill is not a necessary party under Texas law in the very suit brought to set aside his permit. *Magnolia Petroleum Company* v. *Edgar*, (Civ. App.) 62 S. W. 2d 359, writ of error refused by Texas Supreme Court.

There are substantial grounds for doubting that a special statutory suit that may be brought by one who need show no injury to his own property against the administrative body granting his neighbor a

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preme Court will refuse the application with the docket notation.. 'Refused'."

'See also Fairchild v. Hughes, 258 U. S. 126; U. S. v. West Va., 295 U. S. 463; and the following cases arising under the Federal Declaratory Judgment Statute (48 Stat. 955, 28 U.S.C.A. § 400) Ashwander v. T.V.A., 297 U. S. 288; Ohio Cas. Ins. Co. v. Marr, 98 Fed. 2d 973, C.C.A. 10th, Cert. Den., 305 U. S. 675; Smith v. Blackwell, 115 Fed. 2d 186 and Ex-Cello Corp. v. City of Chicago, C.C.A. 7th 117 Fed. 2d 627. In Treemond Co. v. Schering Corp., C.C.A. 3rd 122 Fed. 2d 702, we find the court in a patent infringement case saying "There can be no doubt that an actual controversy does not exist until the patentee makes some claim that his patent is being infringed"

permit which may be prosecuted without the neighbor being a party and whose purpose is solely to "test the validity" of his neighbor's permit, presents a "case or controversy" within the meaning of Article III of the United States Constitution. It is submitted that the statute as construed by Texas courts permits one dissatisfied to invoke judicial determination of the abstract question of validity vel non of his neighbor's well spacing permit; and that such review is outside the province of a federal district court.

A somewhat related problem is that involved in the inquiry whether the Texas statute provides a new substantive right or a mere procedural remedy. The principle is that stated in the leading case of *California Prune and Apricot Grower's Assn.* v. *Catz American Company*, C.C.A. 9th, 60 Fed. 2nd 788, 85 A.L.R. 1117:

> "It is undoubtedly true that a federal court in proper cases may enforce state laws; but this principle is applicable only when the state legislation invoked, creates or establishes a substantive or general right. * * * *The federal courts are without jurisdiction or power to enforce a purely remedial or procedural state law.*" (Emphasis supplied).

Applying this principle the *Catz case* held that a United States district court in California, whose jurisdiction was invoked by reason of diversity of citizenship, had no power to enforce the California arbitration statute. In support of its holding the

court cited *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491; *Henrietta Mills* v. *Rutherford County, N. C.*, 281 U. S. 121; *Matthews* v. *Rogers*, 284 U. S. 521 and *Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109.

In the *Matthews case* this Court said:

> "While local statutes may create new rights, for the protection of which recourse may be had to the remedies afforded by federal courts of equity if the remedy at law is inadequate and the other jurisdictional requirements are present, state legislation cannot enlarge their jurisdiction by the creation of new equitable remedies, nor can it avoid or dispense with the prohibition against the maintenance of any suit in equity in the federal courts, where the legal remedy is adequate."

It is submitted that it is likewise true that under the guise of enforcing Article 6049c of the Texas statutes the jurisdiction of a federal district court may not be enlarged so as to dispense with the necessity of a plaintiff showing substantial injury to himself in the enforcement of an allegedly illegal administrative order. It is not enough for the plaintiff to say that in the instant case he has shown or can show injury. The question is the nature of the proceeding authorized by the Texas statute and not whether an individual plaintiff may in a particular case show more than the state law requires.

The test for the invocation of the rule is whether Sections 8, 10, and 11 of Article 6049C of the Texas

statutes provide new substantive rights or merely procedural remedies. Quite obviously the Texas statute purports nothing more than an expeditious remedy, not existing under the Constitution or at common law (See *Gulf Land Company* v. *Atlantic Refining Company*, supra). The caption of the original enactment provides that it is,

> "An Act * * * *providing a method* whereby any interested party affected by any rule or order made or promulgated by the Commission, shall have the right to institute a suit in Travis County, Texas, against the Commission and seek relief such as may be necessary, *providing the procedure in respect thereto*, * * * (Emphasis supplied; H. B. 25, Acts 42nd Texas Leg., 1st C. S., Ch. 26, p. 46)."

That of the last amendment in 1935 is,

> "An Act * * * providing for suits to test the validity of the oil and gas conservation laws and the rules, regulations or orders thereunder, *and procedure n such suits* * * * (Emphasis supplied; Acts 44th Leg., R. S., Ch. 76, 180.)

The Texas statute provides that an interested person may sue to test the validity of an order of the Texas Railroad Commission. Section 8. In somewhat similar terms Congress provided that in cases of actual controversy an interested party may file a petition for a declaration of rights and other legal relations, such declaration to have the force and effect of a final judgment. 48 Stat. 955, 28 U.S.C.A. § 400. *Aetna Life Insurance Co.* v.

Haworth, 300 U. S. 227, and a host of cases following that decision, hold that this, the Federal Declaratory Judgment Act, creates no new substantive right but is procedural and remedial only. There would appear to be no basis for distinction.

It is submitted that since the Texas statute creates new procedural rights only it is not cognizable by the federal district courts.

The respondents may, however, contend that assuming that Sections 8, 10, and 11 of Article 6049c are purely procedural, nevertheless, the Texas law recognizes certain substantive rights of respondents which respondents by reason of diversity of citizenship are entitled to enforce in the federal courts.

This calls for an examination of their substantive rights. Let us first consider them as they stood in the absence of statutory regulation under the police power. At common law the rule in Texas recognized the ownership of oil and gas in place. That is, each landowner was held to be the owner of the oil and gas beneath his land. *Texas Company* v. *Daugherty*, 107 Tex. 226, 176 S. W. 717, LRA 1917F, 989. But this rule was qualified by a correlative doctrine, the "law of capture".[6] *Stephens County* v. *Mid-Kansas Oil and Gas Co.*, 111 Tex. 160, 254 S. W. 290, 29 A.L.R. 566; *H. & T. C. Ry. Co.* v. *East*, 98 Tex. 146, 81 S. W. 279, 66 L.R.A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827; *Prairie*

[6]See Walker, The Rule of Capture, 13 Tex. L. Rev. 391.

Oil & Gas Co. v. *State* (Tex. Comm. App.) 231 S. W. 1088, 1089. The meaning of the two rules was simply this: one had the right to produce all the oil and gas he could that would flow from the wells on his land regardless of its origin, limited only by the identical right of his neighbor to exercise the identical privilege of drainage by the same "law of capture." An adjoining landowner could not complain of drainage from wells drilled on adjacent properties. His only protection was the right to drill offsets. *He could obtain no injunction. Prairie Oil and Gas Co.* v. *State, supra.* See also *Hunt* v. *State,* 48 S. W. 2d 466, where the Court stated: "No cause of action lies in the owner of the surface against his neighbor for draining the oil and gas from under his land."

Such were Respondents' substantive rights in the absence of police regulation. They could not complain of their neighbors. They were relegated to their remedy of self-help. Under Constitutional direction (Article 16, Sec. 59a) the Legislature enacted laws affecting those substantive rights. The Legislature vested the Texas Railroad Commission with authority to carry out the policy of conserving oil and gas in Texas (Title 102, Revised Civil Statutes of Texas, 1925; for amendments see Title 102, Vernon's Annotated Civil Statutes) by authorizing it to promulgate rules and regulations for the protection of oil and gas. Acting pursuant to that authority the Commission promulgated its spacing rule, Rule 37. The spacing rule supplanted Respondents' right of self-help. The spacing

rule became Respondents' substantive right. But that substantive right of Respondents is not involved in this litigation; for that substantive right,

> " • • • guarantees the opportunity in each owner to recover his oil by providing an exception to a uniform spacing regulation that would otherwise prevent him from doing so." *Brown v. Humble Oil and Refining Co.*, 126 Tex. 296.

Whereas Respondents' previous substantive right was to counteract drainage by offsets, their new substantive right is to apply to the Railroad Commission to drill one or more wells on their own land as exceptions to the spacing rule to "prevent confiscation of property." If, on the other hand, they take advantage of the remedial provisions of Sections 8, 10 and 11 of Article 6049c of the Texas statutes to attempt to nullify an order of the Railroad Commission granting a drilling permit to another operator, they are not enforcing *their* substantive rights (to an exception) but "testing the validity" of their neighbors' right.

The Respondents in these cases are not asserting rights which have been denied to them by the Railroad Commission after proper application for relief. They are merely complaining of the action of the Railroad Commission in acting favorably upon the applications of Burford and Hastings and Dodson to drill wells on their own land. The orders here under attack affect the Respondents at most only indirectly; they do not restrict or limit Respondents' freedom of action in any way. They plainly do not deny to the

Respondents a fair chance to recover the oil and gas in or under their land, or their equivalent in kind, which is the measure of the Respondents' rights as settled by the decisions of the Supreme Court of Texas. *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. 2d 73, 80. In fact, the undisputed evidence in the Burford case shows that Respondents even at the time of the hearing before the Railroad Commission had already recovered 100% of the recoverable reserves originally under their land (R. 286) and this oil had been replaced by other oil drained from other leases. (R. 286, 342). Substantially the same situation exists in the Hastings case.

It is submitted that the procedural portion of the statute is not enforceable in the federal courts for the reasons previously stated; and Respondents substantive rights are not capable of enforcement in a federal court by reason of its diversity jurisdiction until the administrative body has unlawfully denied them their right to drill.

I. (b)

Assuming that the Court proceeding provided by Texas Law involves a "Case or Controversy," does it also involve the determination of State Government policy committed by State statutes to the State Administrative process?

We are frank to state that in our opinion the review contemplated by Article 6049c, Sections 8, 10 and 11 of the orders of the Railroad Commission is

not legislative or administrative in character within the meaning of *Prentis* v. *R. R.*, 211 U. S. 210 and related cases. In our view such is not the effect of the most recent expressions of the Texas Supreme Court.

Railroad Commission v. *Shell Oil Company*, 139 Tex. 66, 161 S. W. 2d 1022, *Railroad Commission* v. *Wencker*, (Tex.) 168 S. W. (2d) 625, 629.

In so interpreting the opinions of the Supreme Court we might possibly be in error. But of this we are quite certain: If the learned judges of the Fifth Circuit Court of Appeals are correct in their interpretation of the opinion of the Texas Supreme Court *that a litigation is entitled to have the independent judgment of the trial court on the question of reasonableness or necessity* (Judge Hutcheson in 128 Fed. 2d 334 at 337; Judge Holmes in 130 Fed. 2d 10 at 13, 16, 19; Judge McCord in 130 Fed. 2d at page 18) then the proceeding authorized by Sections 8, 10 and 11 of Article 6049c of the Texas statutes is administrative or legislative in character within the precise holdings of this Court in the *Prentis* case, supra; *Bacon* v. *Rutland Ry. Co.*, 232 U. S. 134; *Federal Radio Commission* v. *General Electric Company*, 281 U. S. 464; and *Porter* v. *Investors Syndicate*, 286 U. S. 461; *Keller* v. *Potomac Electric Co.*, 261 U. S. 428.

No reference can be found in the opinion of Chief Justice Alexander of the Texas Supreme Court in the *Shell* case, supra, to the exercise by the trial court of an "independent judgment." The question involved

in *Railroad Commission* v. *Shell*, supra, was whether upon the trial contemplated by Section 8 of Article 6049c of the Texas statutes the evidence should be confined to the record made before the administrative agency or whether there should be an "*independent hearing*" of the evidence anew. His holding was simply that there should be a "*hearing of the evidence anew in the trial court.*" The exercise of an "independent judgment" and the building of an "independent hearing" are matters of vastly different consequence.

An illustration of the principles enunciated above can be drawn from the instant cases. In the Burford case the trial court heard testimony to the effect that Burford's tract was a subdivision made from a larger tract in derogation of the commission's applicable spacing rule and that said tract with the wells allowed by the permits in suit would be more densely drilled than surrounding tracts. (Plaintiff's theory)

The court further heard testimony to the effect that the subdivision made in the Burford case was in "substantial compliance" with the commission's spacing rules as that term is defined by Texas decisions and that the owners of the tract had been prevented for a long time from recovering any of the oil under their land while their neighbors had recovered large amounts in the past. (Defendant's theory).

In the Hastings case the district court heard testimony to the effect that Hastings tract was drilled

more densely than plaintiffs' tract and other leases surrounding it. (Plaintiffs' theory) The district court further heard testimony to the effect that defendants' tract was at a 37½% density disadvantage as compared with an area eight times its size surrounding it, same being a method of comparison frequently used by the commission on the issue of drainage. (Defendants' theory)

It is obvious that in each of the above cases the Railroad Commission adopted the defendants' views and rejected plaintiffs' views as evidenced by this litigation attacking the commission's orders.

It is our view that if the district court in the instant cases had entered judgment cancelling the commission's permit orders involved because in his view plaintiffs' theories and suggested yardsticks of comparison were wiser and constituted better bases of comparison than those used by the commission that such determination and judgment by the district judge would constitute an independent determination of the cases clearly administrative in character.

Apparently the Circuit Court of Appeals decided that such independent judicial determination was required under Texas law when it remanded these cases for a new trial. If this view is correct the Circuit Court of Appeals should have instructed the district court to decline jurisdiction until the administrative process was completed.

I. (c)

Does Article 6049c Confine Jurisdiction to a State Court in Travis County, Texas?

We do not feel that we can give a categorical answer to this question. In other words, we do not think that the statutory language restricting the review to "a court of competent jurisdiction in Travis County, Texas, and not elsewhere," was intended to limit or restrict the jurisdiction of the federal courts. We do think, however, that the statute was intended only to create a new statutory procedural remedy exclusively for the state courts and that it was not intended thereby to extend the jurisdiction of the federal courts. For the reasons hereinabove stated, we think that it would have been beyond the competence of the state legislature to create a new procedural remedy in the federal courts and that the remedy created is not a "case or controversy."

While we deem that under the principles set forth, it matters little whether or not the Texas Legislature intended to include a federal district court when it used the phrase, "a court of competent jurisdiction in Travis County, Texas, and not elsewhere," we should like to express our views in response to this question.

Section 8 of Article 6049c of the Texas statutes provides that an interested person, dissatisfied with an order of the Commission may file suit *in a court of competent jurisdiction in Travis County, Texas,*

and not elsewhere, to test the validity of an order of the Commission. Section 11 specifies that either party to the suit may appeal from the trial court's judgment; that such appeal "shall at once be returnable to the appellate court" and have precedence over all other cases. Section 11 further provides that, "*In the Court of Civil Appeals*" the court shall immediately decide the questions involved and that in the event any question or questions shall be certified to the *Supreme Court* or writ of error thereto be requested or granted, it is made the duty of the Supreme Court immediately to set down said cause for hearing. The last paragraph of the section vests the courts of civil appeals and their judges with jurisdiction to issue such writs of prohibition, mandamus and injunction as may be necessary to prevent the enforcement of an order of the trial court granting injunctive relief without notice and hearing.

Clearly, it would appear that while the Texas Legislature sought neither to include or exclude a federal court, it had reference to a Travis County District Court, to a Texas Court of Civil Appeals, and to the Texas Supreme Court. No Texas court has held otherwise. In *Alpha Petroleum Company v. Terrell* (Comm. App. 1933) 122 Tex. 257, 59 S. W. 2d 364, the Texas Commission of Appeals in an opinion adopted by the Texas Supreme Court held that under the appeal statute as originally enacted, the suit,

> "* * * *must be brought in a district court of Travis County, Texas, and that this requirement is one of jurisdiction, and not a mere question of venue.*" (Emphasis Supplied)

To the same effect is *Ex parte Lee*, 127 Tex. 256; 93 S. W. 2d 720; and in *Altgelt* v. *Texas Company*, (Civ. App.) 101 S. W. 2d 1104, writ dismissed by Texas Supreme Court, we find the court saying:

> *"It is likewise now settled that the district court of Travis County has exclusive jurisdiction to determine the validity of the Railroad Commission's order in such cases."*

It is true that in *Reagan* v. *Farmers Loan and Trust Company*, 154 U. S. 362, 38 L. Ed. 1014, in interpreting the phrase in the section of the statute providing for review of railroad rates that suit be "in a court of competent jurisdiction in Travis County, Texas," this Court held that the Federal Circuit Court for the Western District of Texas was a "court of competent jurisdiction in Travis County."

It is likewise true that in *MacMillan* v. *Railroad Commission of Texas*, 51 Fed. 2d 400, a stautory three-judge district court, citing the *Reagan* case for authority, held that under another Texas review statute, now repealed, plaintiff could maintain suit in a Federal District Court for relief against the proration orders involved *"if they are, as to plaintiff, unreasonable and unjust."*

In the *Reagan* case the question was whether or not a suit against the members of the Railroad Commission and the Attorney General to restrain the enforcement of a rate order was in effect a suit against the state inhibited by the 11th Amendment to the United States Constitution. After holding that it

was not such a suit Mr. Justice Brewer proceeded to state that in any event the Legislature had authorized suit by parties complaining of orders of the Commission.

The *MacMillan* case followed this dictum. It provides little assistance. The proration order there involved was a legislative order operating directly upon the plaintiff and requiring that he cut his production from a potential of 50,000 bbls. daily to 1,455 bbls. daily. Plaintiff alleged and the Court held he proved that the Commission had no statutory authority to enter the order.

In addition, the statute involved in neither case was the same as the statute involved in this case. Neither statute, like Article 6049c, provided for expeditious appeals from the "court of competent jurisdiction in Travis County, and not elsewhere" to the Court of Civil Appeals, and therefrom to the Supreme Court. See Section 11, Article 6049c.

We pass to a more impelling consideration. Rule 1 of the Rules of Civil Procedure for the District Courts of the United States adopted by this Court pursuant to the Act of June 19, 1934, Ch. 651, provides that the rules "govern procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. Rule 81 contains no exception for special statutory proceedings such as that provided by the Texas statute, and the Conformity Act has been superseded. 1 7 Hughes Federal Practice § 18501.

The difficulties involved in reconciling the Rules with the special procedure provided in Article 6049c are manifest:

Advancement in trial court. Section 8 of Article 6049c provides that the suit shall be advanced for trial and determined as expeditiously as possible. No postponement is to be granted save for reasons deemed imperative to the court. Rule 40 provides:

> "The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States."

Injunctions. Section 10 of Article 6049c provides that no temporary restraining order, temporary or permanent injunction, or any character of injunctive relief may be granted against the Commission without five days notice and a hearing; further that a verified petition shall not be sufficient to overcome the presumptive validity of the order complained of or to empower the court to grant any character of injunctive relief. Rule 65 (b) provides in part:

> "No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage

> will result to the applicant before notice can be served and a hearing had thereon. * * * "

Supersedeas. After adverse judgment in a state court the Commission may supersede the judgment without giving bond. *Allen* v. *Gulf Oil Corporation*, (Civ. App.) 139 S. W. 2d 207, writ of error refused by Texas Supreme Court; Article 2276, Vernon's Annotated Civil Statutes[6]. Rule 73 provides, in part:

> "Whenever an appellant entitled thereto desires a stay or appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. * * * "

Finally, in the Courts of Civil Appeals and in the Texas Supreme Court causes under Article 6049c have precedence over all other causes, proceedings and causes of a different character.

It is submitted that the State of Texas may lawfully provide a special procedural statute in oil and gas conservation cases and that in so providing, its right to speedy advancement, precedence in trial, injunction only after notice and hearing and right to supersede cannot be impaired by the Federal Courts.

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[6] "Neither the State of Texas, nor any county in the State of Texas, nor the Railroad Commission of Texas, nor the head of any department of the State of Texas, prosecuting or defending in any action in their official capacity, shall be required to give bond on any appeal or writ of error taken by it, or either of them, in any civil case."

II

Are there grounds similar to those existing in Railroad Commission v. Pullman Co., 312 U. S. 496, which make it appropriate for the district court in its discretion to withhold the exercise of its equity jurisdiction?

We understand the reasons for this Court's decision in the *Pullman* case to be that the state statute involved in that case had not been construed by the state courts, whose decision would necessarily be authoritative, and that, since a speedy remedy was available in the state courts, the federal courts would withhold at least temporarily the exercise of their equity jurisdiction. If our understanding is correct, the primary basis for the decision in the *Pullman* case is not present in these cases, because the state statute here involved has been construed many times by the state courts. There are other reasons, which we have attempted to set forth herein, why the parties should be relegated to the state courts for the determination of the issues of state law, but we do not think that it can be correctly said that these reasons are the same as in the *Pullman* case.

III

In view of the recent decisions of the Texas courts, are there grounds similar to those existing in Railroad Commission v. Rowan & Nichols Oil Co., 311 U. S. 614, 615, which make it appropriate for the district court to decline jurisdiction of the cause?

We think that similar grounds exist for the district court to decline jurisdiction, as in the *Rowan & Nichols* case, of the determination of the validity of the Railroad Commission order under the state law, for the reasons stated below:

The portion of the Rowan & Nichols opinion referred to in the Court's question is as follows: (311 U. S. 614, 615)

> "While the presence of a federal question may also open up state issues, Siler v. Louisville & N. R. R., 213 U. S. 175, 29 S. Ct. 451, 53 L. Ed. 753, the claim here founded on Texas law is derived from a statute requiring proration on a 'reasonable basis.' Vernon's Texas Annotated Civil Statutes, Art. 6049c, Sec. 7. The Texas decisions, insofar as they have been brought to our attention, do not make clear whether the local courts may exercise an independent judgment on what is 'reasonable.' Compare Brown v. Humble Oil & Refining Co., 126 Tex. 296, 316, 83 S. W. 2d 935, 87 S. W. 2d 1069, 99 A.L.R. 1107, 101 A.L.R. 1393. But, in any event, as we read the Texas cases, the standard of 'reasonable basis' under the statute opens up the same range of inquiry as the respondent in effect asserted to exist in his claims under the Due Process Clause. These latter claims we have found untenable. What ought not to be done by the federal courts when the Due Process Clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute. Whether the respondent may still have a remedy in the state courts is for the Texas courts to determine, and is not foreclosed by the denial, on the grounds

we have indicated, of the extraordinary relief of an injunction in the federal courts."

We assume that in its question No. 3, stated above, this court in speaking of declining "jurisdiction of the cause" intended to refer only to jurisdiction insofar as the determination of the validity of the order under the state law is concerned, since this Court in the *Rowan & Nichols* case did not decline to pass on the constitutional issues presented.

This Court states in the *Rowan & Nichols* case, supra, that the Texas decisions do not make clear "whether the local courts may exercise an independent judgment on what is 'reasonable.'" The first question, therefore, is whether the recent Texas decisions have clarified this question. This can be determined by a comparison of the language in the opinion in *Brown* v. *Humble Oil & Refining Co.*, with the language in the recent decisions of the court. In the *Brown* case, the Supreme Court of Texas, at the place referred to in this Court's opinion, said: (126 Tex. at p. 316)

> "We recognize that the Railroad Commission is authorized to make rules relating to the production of oil and gas. *This Court will not undertake to prescribe any rule or standard to guide the Commission, except that its actions must be legal, reasonable, and not arbitrary.* There are many factors, facts, and circumstances, which we shall not undertake to detail here, in each case and in each hearing, which must be considered, weighed, and given effect,

in the fair and reasonable administration of such laws, rules, and exceptions. All questions of fact are primarily for the Commission to determine.

"We held in the original opinion, and reiterate it here, that the Legislature enacted certain laws which declare the public policy of the State with respect to the development and conservation of oil and gas, and placed the duty upon the Railroad Commission to carry out the details. The duty is lodged with the Railroad Commission to make rules to carry out the mandates of the Legislature, and to impartially enforce them. In the exercise of its power to grant exceptions to its rules, it is the duty of the Commission to treat all interested parties justly, fairly, and impartially under all the facts and circumstances of the case; and *the actions and rulings of the Commission in attempting to accomplish such results will not be disturbed by the courts, unless they are clearly illegal, unreasonable, or arbitrary.* All rules and rulings of the Railroad Commission are presumed to be valid until the contrary is made to appear. If a rule of the Commission is found to be illegal or invalid by a court of competent jurisdiction, such court may so adjudge. *The court cannot substitute a new rule for the one adjudged invalid.* That power rests exclusively with the Railroad Commission." (Our emphasis.)

The Circuit Court of Appeals purports to find in the decision of the Supreme Court of Texas in *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 161 S. W. (2d) 1022, a clarification of the Texas law to the effect that the state courts may exercise an independent judgment as to what is "reasonable."

(Judge Hutcheson, 128 F. (2d) at p. 337; Judge Holmes, 130 F. (2d) at pp. 16, 19). We submit that there is nothing in Chief Justice Alexander's opinion to justify this conclusion. The phrase "independent judgment" does not occur in his opinion. It is true that he says, relying on earlier decisions, that there must be an "independent hearing" of the evidence by the court, because the Texas statutes provide no method for the making of a record before the Railroad Commission and an appeal on that record. (139 Tex. at p. 76; 161 S. W. (2d) at p. 1028). But Chief Justice Alexander does not say that the court will substitute its ideas of reasonableness for those of the Railroad Commission. On the contrary his words are as follows: (139 Tex. at p. 78; 161 S. W. (2d) at p. 1029)

> "If the matter covered by the order is one committed to the agency by the Legislature, and involves the exercise of its sound judgment and discretion in the administration of the matter so committed to it, the court will not undertake to put itself in the position of the agency, and determine the wisdom or advisability of the particular ruling or order in question, but will sustain the action of the agency so long as its conclusions are reasonably supported by substantial evidence. This is so because, since the Legislature has seen fit to vest authority to exercise sound judgment and discretion in the particular matter in the administrative agency, courts will not undertake to usurp the powers committed to the agency, and to exercise the agency's judgment and discretion for it."

We submit that there is no difference in the law as

stated by Chief Justice Alexander in the *Shell* case from the law as previously stated in the *Brown* case. Our conclusion is fortified by the language used by the Supreme Court of Texas in the case of *Railroad Commission* v. *Wencker*, 168 S. W. (2d) 1625, (decided since the first argument in these cases), in which the Texas court said: (168 S. W. (2d) at p. 629)

> "The statutes authorize the Railroad Commission to handle the details relating to the production of oil and gas in the State. Article 6004 et seq., Vernon's Annotated Civil Statutes. The Railroad Commission has exclusive original jurisdiction to determine the matter of changed conditions in granting permits to drill wells, subject to the right of appeal to the courts. Magnolia Petroleum Co. v. New Process Production Co., 129 Tex. 617, 104 S. W. (2d) 1106; Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S. W. (2d) 73; Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S. W. (2d) 935, 99 A. L. R. 1107. The Railroad Commission is given the power to determine primarily all fact issues, that is, all issues that are not established as a matter of law; and to permit the courts to pass upon a question not passed on by the Commission would violate such power. Gulf Land Co. v. Atlantic Refining Co., supra; Brown v. Humble Oil & Refining Co., supra."

In view of the foregoing language in the more recent opinions of the Supreme Court, we think it is impossible to say that the Texas law is any different from what it was at the time the *Rowan & Nichols* cases were decided. Certainly the Supreme Court

of Texas in the *Shell* case did not purport to change the law but merely stated that it was following the rules laid down in previous decisions. We, therefore, submit that it may be said with equal support in the Texas decisions now as at the time of the *Rowan & Nichols* cases were decided (1) that the Texas decisions do not make clear whether the local courts may exercise an independent judgment on what is reasonable, but (2) apparently, according to the Texas cases, the standard of reasonableness under the Texas law is substantially the same as the standard of reasonableness used by this Court in testing the validity of an administrative order under the Due Process Clause (with the exception, which we have already pointed out, that under the special Texas statutory appeal, the complaining party does not have to show actual injury to his property interests). There having been no change in the Texas law, there is no reason why this Court should now reach a different conclusion from the conclusion reached in the *Rowan & Nichols* cases.

If, however, we are mistaken as to the proper interpretation to be placed on the more recent decisions of the Supreme Court of Texas, and if the Texas Courts must in fact exercise an "independent judgment" as to what is reasonable, then we submit that clearly the federal district courts should decline jurisdiction to pass on the validity of the orders under the state law because the proceedings would then be clearly administrative and not judicial in character. By the exercise of an independent judgment as to what is reasonable the Circuit Court of Appeals

must have meant that the court could substitute its discretion for that of the Railroad Commission and, if it found another order to be more reasonable, it could then nullify the Railroad Commission's decision. This would clearly be doing, under the guise of enforcing a state statute, what is not done when the Due Process Clause is invoked. This is exactly what this court held should not be done in the *Rowan & Nichols* cases.

As we have already pointed out[7], each of these cases involves questions of policy which involve the choice as to whether one method or another is a more reasonable basis for determining whether a permit to drill a well should be issued. For example, in the *Hastings* case the Commission had to decide whether the basis for comparison of density of drilling should be the lease as compared with a surrounding area equal to eight times the area of the lease, or as compared with the entire area of all of the surrounding leases. The Commission chose the former method; the respondents say the latter method is more reasonable. Should the district court, exercising its "independent judgment," strike down the order because the respondents' method is more reasonable? We submit that the answer should be "no" for the same reasons that the court declined to exercise jurisdiction to pass on the validity of the order under the state law in the *Rowan & Nichols* cases.

Similar questions of policy are involved in the *Burford* case. Is the application for a permit on the

[7]Page 15, supra.

Burford strip a substantial compliance with the spacing rule? The respondents say it is not, because of the narrowness of the strip; the Railroad Commission in granting the permit impliedly found that it was a substantial compliance, because of the area of the strip. Should the court set aside the Railroad Commission's order if it finds that the respondents' contention is more reasonable? We submit that such exercise of an "independent judgment" would be beyond the proper exercise of the judicial function and clearly in conflict with the *Rowan & Nichols* decisions.

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APPENDIX

Texas Statutes relating to the power of the Railroad Commission to promulgate and enforce well-spacing orders and appeals to the courts from such orders. All Statutes here copied are to be found in Vernon's Annotated Texas Civil Statutes.

"Article 6014. 'Waste'

"The production, storage or transportation of crude petroleum oil or of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term "waste" among other things shall specifically include:

" . . .

"(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, locating, spacing or operating well or wells as to reduce or tend to reduce the total ultimate recovery of crude petroleum oil or natural gas from any pool.

"(g) Waste or loss incident to, or resulting from, the unnecessary, inefficient, excessive or improper use of the reservoir energy, including the gas energy or water drive, in any well or pool; however, it is not the intent of this Act to require repressuring of an oil pool or that the separately owned properties in any pool be utilized under one management, control or ownership."

"Article 6029. 'Rules and Regulations'

"The Commission shall make and enforce rules, regulations or orders for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, including rules, regulations or orders for the following purposes:

"(1) To prevent the waste, as hereinbefore defined, of crude petroleum oil and natural gas in drilling and producing operations and in the storage, piping and distribution thereof.

" . . .

"(3) For the drilling of wells and preserving a record thereof.

"(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

" . . .

"(8) It shall do all things necessary for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, and shall make and enforce such rules, regulations or orders as may be necessary to that end.

"(9) To provide for the issuance of permits, tenders, and other evidences of permission when the issuance of such permits, tenders, or permission is necessary or incident to the enforcement of its rules, regulations, or orders for the prevention of waste."

"Article 6036a. 'Notice of Hearing'

"No rule, regulation or order shall be adopted by the Commission under the provisions of this Act or of Title 102 of the Revised Civil Statutes of Texas, 1925, as amended, dealing with the conservation of oil and gas and the prevention of the waste thereof, except after hearing upon at least ten (10) days notice given in the manner and form prescribed by the Commission; provided that in case of an emergency is found by the Commission to exist which, in its judgment requires the making of a rule, regulation or order without notice and hearing, such emergency rule, regulation or order may be promulgated and shall have the same validity as if a hearing with respect to the same had been held after due notice. The emergency rule, regulation or order authorized herein shall remain in force no longer than fifteen (15) days from its effective date and, in any event, it shall expire when the rule, regulation or order made after due notice and hearing with respect to the subject matter of such emergency rule, regulation or order becomes effective.

"The Commission may, without prior notice, revoke any rule, regulation or order, promulgated by it; and it may, without prior notice, amend the same, provided the subject matter of the amendment was considered at the hearing made the basis for such rule, regulation or order. The renewal or extension of any rule, regulation or order shall be based upon a hearing after proper notice, subject to the provisions of this Section with reference to emergency rules, regulations and orders."

"Article 6046. 'Rules for prevention of waste'

"The Commission, when necessary, shall make and enforce rules and regulations either general in their nature or applicable to particular oil fields for the prevention of actual waste of oil or operations in the field dangerous to life or property.

"Article 6049c. 'Oil and gas conservation, powers and duties of Railroad Commission'

"Section 8.

"Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations, or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

"Section 10.

"No injunction, whether temporary restrain-

ing order, temporary injunction, permanent injunction, or other character of injunctive relief, shall be granted against the Railroad Commission, its members, agents, and representatives, to restrain it or them from enforcing any rule, regulation, or order made and promulgated by the Railroad Commission under the conservation statutes of this State, relating to oil and gas, or any amendments thereof, or restrain the enforcement of any such statute, except after notice to the Commission and a hearing as hereinafter provided; provided that when a petition or application is filed asking for any such character of temporary injunctive relief, the clerk of the court in which such petition or application is filed shall issue notice to the Commission in writing, which notice shall contain the docket number, style, and a brief statement of the nature of such suit, and such notice shall be served on the Commission by delivering a copy of such citation to the Commission or any member thereof, or to the Secretary thereof, in Travis County, for the service of other citations, and five (5) days from and after the service of such notice a hearing may be had on such application; provided further that the rule, regulation, or order complained of shall be taken as prima facie valid and the use and introduction of the verified petition of plaintiff shall not be sufficient to overcome the prima facie validity of the rule, regulation, or order complained of, or to empower the court to grant any injunctive relief against the enforcement of said rule, regulation, or order; provided further, that before any order granting any character of injunctive relief against any such statute or against any such rule, regulation, or order of the Commission shall become effective the plaintiff shall be re-

quired by the court to execute a bond with good and sufficient sureties in an amount to be fixed by the court reasonably sufficient to idemnify all persons when the court may find from the facts proven will suffer damages by reason of the violation of the statute, rule, regulation, or order complained of, such persons to be named in the order of the judge when the amount of the bond is fixed by the court and entered of record; provided further, that the finding of the court that any party is likely to suffer damages shall not be admissible as evidence of damages in any suit on such bond. . . . "

"Section 11.

"After notice and hearing is had upon application for any such injunctive relief either party to said suit has the right of appeal from any judgment or order therein granting or refusing any injunction, whether temporary restraining order, temporary injunction, permanent injunction, or other character of injunctive relief, or from any order granting or overruling a motion to dissolve any such injunction. Said appeal shall at once be returnable to the appellate court and said action so appealed shall have precedence in said appellate court over all cases, proceedings, and causes of a different character therein pending. The provisions and requirements of Article 4662, Revised Civil Statutes of 1925, relating to temporary injunctions shall likewise apply to appeals from any order granting or refusing a temporary restraining order, or granting or overruling a motion to dissolve such temporary restraining order, under the provisions of this Act. In the Court of Civil Appeals such court shall immediately and at as

early a date as possible decide the questions involved therein; and in the event any question or questions shall be certified to the Supreme Court, or writ of error thereto be requested or granted, it is here made the duty of the Supreme Court immediately to set down said cause for hearing and decide the cause at as early a date as possible, and such cause shall have precedence over all other causes, proceedings and causes of a different character in such court. . . . "